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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 MATTHEW LEWIS, d/b/a U S FINISH,

11 Plaintiff,

12 v.

13 TULALIP HOUSING LIMITED  
14 PARTNERSHIP #3, a Washington limited  
partnership; RAYMOND JAMES  
15 NATIVE AMERICAN HOUSING  
OPPORTUNITIES FUND II, L.L.C., a  
16 Delaware limited liability company;  
MIKE AVILA and PATTI GOBIN,  
17 husband and wife, and the marital  
community comprised thereof; CHUCK  
18 JAMES and JANE DOE JAMES, husband  
and wife, and the marital community  
19 comprised thereof,

20 Defendant.

CASE NO. C11-1596-RSM

ORDER GRANTING PLAINTIFF'S  
MOTION FOR REMAND

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**I. INTRODUCTION**

This matter comes before the Court upon Plaintiff's Motion to Remand to State Court and for an Award of Fees and Costs (Dkt. # 7). For the reasons set forth below, Plaintiff's motion is GRANTED.

## II. DISCUSSION

### A. Background

Plaintiff brought this action in Snohomish County Superior Court on July 1, 2011, naming defendants Mike Alva, Patti Gobin, Chuck James, and Jane Doe James (the “Individual Defendants”), Raymond James Native American Housing Opportunities Fund II, L.L.C. (the “Fund”), and Tulalip Housing Limited Partnership #3 (the “Partnership”). Plaintiff is a citizen of the state of Washington. The Individual Defendants are enrolled members of the Tulalip Tribes, who live on the Tulalip Reservation, and are also Washington residents. The Partnership is a Washington limited partnership with its principal place of business in Washington. The Fund is a Delaware limited liability corporation with its principal place of business in Florida.

On August 31, 2011, the state court granted a motion to dismiss for lack of subject matter jurisdiction filed on behalf of the Individual Defendants and the Partnership. The non-diverse defendants provided three bases for the motion. First, they claimed that the tribal court had exclusive jurisdiction over Plaintiff’s claims. Second, they argued that Individual Defendants had sovereign immunity as Plaintiff’s claims arose out of the performance of their official duties and, in any event, the state had not assumed jurisdiction over claims against tribal members occurring on tribal lands. Finally, the defendants contended that Tulalip Tribes was an indispensable party that could not be joined because of sovereign immunity. The state court granted the motion without indicating the grounds upon which the dismissal was based.<sup>1</sup>

On September 23, 2011, the Fund removed the action to this Court, asserting removal jurisdiction predicated on the complete diversity between the parties and an amount in

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<sup>1</sup> If the state court indicated the grounds for dismissal in its oral comments, neither party has so notified this Court.

1 controversy exceeding \$75,000. *See* 28 U.S.C. §§ 1446 & 1332. The removal was filed within  
2 thirty days of August 31, 2011, the date upon which the state court issued its oral ruling  
3 dismissing the non-diverse defendants from the lawsuit. *See* 28 U.S.C. 1446(b). Also pending  
4 before the Court is the Fund’s motion to dismiss for lack of subject matter jurisdiction pursuant  
5 to Fed. R. Civ. P. 12(b)(1). *See* Dkt. # 15.

6 In its motion to remand, Plaintiff argues that removal is improper under the  
7 voluntary/involuntary rule because Plaintiff did not engage in any voluntary act that rendered the  
8 case removable. *See People of State of Cal. By and Through Lungren v. Keating*, 986 F.2d 346,  
9 348 (9th Cir. 1993). Rather, the non-diverse defendants were dismissed, over Plaintiff’s  
10 objection, when the state court granted the defendants’ motion to dismiss for lack of subject  
11 matter jurisdiction. In retort, Defendant argues that a dismissal based on lack of subject matter  
12 jurisdiction is not subject to the voluntary/involuntary doctrine or, in the alternative, that the non-  
13 diverse defendants were fraudulently joined to defeat federal jurisdiction.

## 14 **B. Analysis**

### 15 1. Standard

16 “Any civil action brought in a State court of which the district courts of the United States  
17 have original jurisdiction, may be removed by the defendant or the defendants, to the district  
18 court of the United States for the district ... where such action is pending.” 28 U.S.C. §  
19 1441(a); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). The Court may remand a case  
20 to state court, on motion by either party and at any time before final judgment, when the court  
21 finds it lacks subject matter jurisdiction over the claims. 28 U.S.C. § 1447(c). The “burden of  
22 establishing federal jurisdiction is on the party seeking removal, and the removal statute is  
23 strictly construed against removal jurisdiction.” *Prize Frize, Inc. v. Matrix Inc.*, 167 F.3d 1261,  
24 1265 (9th Cir. 1999), *superseded by statute on other grounds as stated in Abrego Abrego v. Dow*

1 | *Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006). Any doubt as to the right of removal is resolved in  
2 | favor of remand. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

3 | Removal based on diversity of citizenship jurisdiction requires establishing the parties'  
4 | diverse citizenship and an amount in controversy exceeding \$75,000. 28 U.S.C. § 1332; *Sanchez*  
5 | *v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). In addition, under the  
6 | voluntary/involuntary rule, if a suit could not be filed in federal court at the time of its filing,  
7 | then it “must ‘remain in state court unless a “voluntary” act of the plaintiff brings about a  
8 | change that renders the case removable.’ ” *Keating*, 986 F.2d at 348 (quoting *Self v. General*  
9 | *Motors Corp.*, 588 F.2d 655, 657 (9th Cir. 1978) (emphasis added). An exception to the  
10 | voluntary/involuntary rule exists where non-diverse defendants have been fraudulently joined for  
11 | the purpose of defeating diversity jurisdiction. *Self*, 588 F.2d at 656. “Fraudulent joinder is a  
12 | term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the  
13 | failure is obvious according to the settled rules of the state, the joinder of the resident defendant  
14 | is fraudulent.” *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1389 (9th Cir. 1987); *see also*  
15 | *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998).

## 16 | 2. Voluntary/Involuntary Rule

17 | Here, the Court agrees with Plaintiff that the voluntary/involuntary rule applies to prevent  
18 | removal of this action. Plaintiff’s case could not have been brought in federal court because  
19 | diversity jurisdiction did not exist. Further, the parties concede that Plaintiff did not seek to  
20 | dismiss the resident defendants in the action below, and that the dismissal was effected over  
21 | Plaintiff’s objection. *See* Dkt. # 1, Ex. 9. Accordingly, the Plaintiff did not engage in any  
22 | voluntary act that would render the case removable.

1       3. Insinga Exception to Voluntary/Involuntary Rule

2           The Fund argues that the fact that the resident defendants were dismissed for lack of  
3 subject matter jurisdiction renders the voluntary/involuntary rule inapplicable. The Court  
4 disagrees. In *Insinga v. LaBella*, the Eleventh Circuit held that the voluntary/involuntary rule did  
5 not apply where the non-diverse defendant was dismissed in state court for jurisdictional reasons,  
6 rather than on the merits. 845 F.2d 249 (1988). The Eleventh Circuit's analysis was based on  
7 language from *Whitcomb v. Smithson*, which is widely cited as the case that first announced the  
8 voluntary/involuntary rule. 175 U.S. 635 (1900). There, the Supreme Court held that a removal  
9 was improper because the plaintiff had not undertaken a voluntary action that rendered the case  
10 removable. *Id.* In doing so, it noted that the dismissal in state court had been "on the merits, and  
11 not a ruling on the question of jurisdiction." 175 U.S. at 638. Based on this language, the  
12 *Insinga* court inferred that the inverse was also true: that where a dismissal was *not* on the merits,  
13 and *was* a ruling on the question of jurisdiction, the voluntary/involuntary rule did *not* apply.  
14 *Insinga*, 845 F.2d at 254.

15           The Ninth Circuit has yet to address whether an exception to the voluntary/involuntary  
16 rule ought to exist for jurisdictional dismissals of non-diverse defendants. See *Keating*, 986 F.2d  
17 at 348 (stating simply that "[t]he rule provides that a suit which, at the time of filing, could not  
18 have been brought in federal court must remain in state court unless a voluntary act of the  
19 plaintiff brings about a change that renders the case removable.") However, several district  
20 courts outside of the Eleventh Circuit have affirmatively rejected *Insinga*. See *Arthur v. Du Pont*,  
21 798 F. Supp. 367, 369 n. 2 (S.D. W.Va. 1992) (collecting cases). In effect, the *Insinga* exception  
22 expands the fraudulent joinder exception, discussed *infra*, to include not only those instances in  
23 which the plaintiff's failure to state a claim against the non-diverse defendant was obvious at the  
24 outset of the lawsuit, but also those instances in which a jurisdictional defect may have been

1 latent or hotly contested. The Court is hesitant to expand the scope of removal jurisdiction to  
2 such a degree where there is no binding precedent supporting such a precedent. *See Gaus v.*  
3 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (holding that any doubt as to the right of removal  
4 is resolved in favor of remand). *See also Self*, 588 F.2d at 659 (holding that the policy behind the  
5 voluntary/involuntary rule is to allow the plaintiff, through the allegations made in his complaint,  
6 to determine the removability of his case throughout the litigation.”) Finally, to the extent that  
7 *Insinga* is predicated on Supreme Court doctrine, this Court is not persuaded that *Whitcomb*  
8 stands for the proposition ascribed to it by the Eleventh Circuit. The question of whether  
9 dismissal of non-diverse defendants could stand as a predicate for removal jurisdiction based on  
10 diversity was not before the Court in that matter. *See Whitcomb*, 175 U.S. at 638.

11 4. Fraudulent Joinder Exception to Voluntary/Involuntary Rule

12 The Fund argues, in the alternative, that Plaintiff fraudulently joined the Individual  
13 Defendants and the Partnership in the state court action to avoid federal jurisdiction. Fraudulent  
14 joinder is a well-settled exception to the voluntary/involuntary rule. *See Self*, 588 F.2d at 659.  
15 Joinder of non-diverse defendants is fraudulent if the plaintiff fails to state a claim against those  
16 defendants, and the failure is obvious under settled state law. *McCabe*, 811 F.2d at 1389.

17 Here, the state court dismissed the Individual Defendants and the Partnership for lack of  
18 subject matter jurisdiction, finding (1) that the tribal court had exclusive jurisdiction over the  
19 plaintiff’s claims, (2) that the Individual Defendants enjoyed sovereign immunity, and/or (3) that  
20 the Tulalip Tribes was an indispensable party. It was not obvious that the state court would  
21 reach this conclusion. The standard for determining whether the tribal court has exclusive  
22 jurisdiction over a particular matter is complex and multi-faceted. *See Montana v. United States*,  
23 450 U.S. 544, 101 S.Ct 1245, 67 L.Ed. 493 (1981) (holding that a tribe has jurisdiction over non-  
24 members "who enter into a consensual relationship with the tribe or its members" and non-

1 member conduct that "threatens or has some direct effect on the political integrity, the economic  
2 security, or the health and welfare of the tribe," based on the tribe's "inherent power" to regulate  
3 such matters.). *See also Rodriguez v. Wong*, 119 Wn. App. 636, 640 (2004) (holding that a tribal  
4 court's jurisdiction is *exclusive* if it is necessary "to protect tribal self-government or to control  
5 internal relations.")). Similarly dismissal based upon sovereign immunity requires specific  
6 findings regarding whether individual defendants are tribal officials and whether they were  
7 acting as representatives of the tribe during the time period in question. *See Hardin v. White*  
8 *Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). Finally, the indispensability of a  
9 defendant involves many factors which "must be carefully analyzed because the question of  
10 whether a party is necessary under CR 19 calls for determinations that are heavily influenced by  
11 the facts and circumstances of individual cases." *Burt v. Wash. State Dep't of Corrections*, 168  
12 Wn.2d 828, 842 (2010). Each of these standards is far too complex and fact-specific for the  
13 Court to determine that Plaintiff knew or could have known from the outset that its claims  
14 against the non-diverse defendants would be dismissed. The fraudulent joinder exception does  
15 not apply. Plaintiff's motion to remand is GRANTED.

16 5. Pending Motion to Dismiss for Lack of Subject Matter Jurisdiction

17 Finally, the Court addresses Defendant's pending motion to dismiss for lack of subject  
18 matter jurisdiction (Dkt. # 15). Federal removal jurisdiction is limited to civil actions "brought  
19 in a State court of which the district courts of the United States have original jurisdiction." 28  
20 U.S.C. § 1441. The "burden of establishing federal jurisdiction is on the party seeking removal."  
21 *Prize Frize, Inc.*, 167 F.3d at 1265. In this motion, the Fund argues, "this Court lacks subject  
22 matter jurisdiction over this matter because *the Tulalip Tribal Court has exclusive jurisdiction.*"  
23 Dkt. # 15, p. 6 (emphasis added). The Court is concerned that the Fund, in asserting removal  
24 jurisdiction and opposing Plaintiff's motion to remand, claims that this Court has original

1 jurisdiction over Plaintiff's claims (Dkt. ## 1 & 8), yet, in the same breath, the Fund argues that  
2 the action should be dismissed for *lack* of subject matter jurisdiction (Dkt. # 15). This  
3 equivocation on the part of the Fund provides the Court with an independent basis for granting  
4 Plaintiff's motion to remand.

5 6. Motion for Fees and Costs

6 "An order remanding the case may require payment of just costs and any actual expenses,  
7 including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). The  
8 determination to award costs and fees under § 1447(c) is within the discretion of the district  
9 court. *Martin*, 546 U.S. at 139, 126 S.Ct. 704. However, "[a]bsent unusual circumstances, courts  
10 may award attorney's fees under § 1447(c) only where the removing party lacked an objectively  
11 reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists,  
12 fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Removal is  
13 not objectively unreasonable simply because the removing party's arguments lack merit and the  
14 removal is ultimately unsuccessful. *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th  
15 Cir.2008). Rather, the court should assess "whether the relevant case law clearly foreclosed the  
16 defendant's basis of removal" by examining the "clarity of the law at the time of removal." *Id.* at  
17 1066; *see also Patel v. Del Taco, Inc.*, 446 F.3d 996, 999–1000 (9th Cir.2006) (suggesting that a  
18 frivolous basis for removal justifies an award of fees).

19 Here, the Fund had no objectively reasonable basis for seeking removal. Plaintiff did not  
20 voluntarily dismiss the non-diverse defendants and there was no basis to infer that the defendants  
21 had been fraudulently joined in the lawsuit. There is no binding precedent upholding an  
22 exception for dismissals based on jurisdiction, rather than on the merits. Finally, Defendants  
23 have moved to dismiss for lack of subject matter jurisdiction. Upon remand to state court, the  
24 state court shall determine the amount of fees and costs to be imposed.



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2 **III. CONCLUSION**

3 For each of the reasons above, and having considered Plaintiff's motion, the response and  
4 reply, all declarations and attachments thereto, and the remainder of the record, the Court hereby  
5 finds and ORDERS:

6 (1) Plaintiff's Motion to Remand (Dkt. # 7) is GRANTED.

7 (2) This action is hereby DISMISSED and remanded to state court. All pending motions are  
8 stricken as moot.

9 (3) The Clerk of the Court is directed to forward a copy of this order to all counsel of record.

10 Dated this 9<sup>th</sup> day of December 2011.

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13 RICARDO S. MARTINEZ  
14 UNITED STATES DISTRICT JUDGE  
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